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No. 135

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

FREDERICK WALZ,
Appellant,

–against–

TAX COMMISSION OF THE CITY OF NEW YORK,
Appellee

Appeal from the Court of Appeals of the State of New York

BRIEF OF PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE

Franklin C. Salisbury
1518 K Street, N. W.
Washington, D. C. 20005
Tel. No. (202) 783-3617
Attorney for Amicus

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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BRIEF OF PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE[1]

INTEREST OF THE AMICUS CURIAE

"Americans United," incorporated as Protestants and Other Americans United for Separation of Church and State, is a nonprofit, educational corporation organized under the

[1] All parties have consented in writing to the filing of this brief.

laws of the District of Columbia and is a national organization of over 100,000 members interested in the preservation of religious civil rights guaranteed the people by the constitutional principle of separation of church and state. The sole purpose of the group is the defense of religious liberty under the religious liberty clauses of the state and Federal constitutions.[2] "Americans United" and many of its members have suits pending in various courts seeking redress for alleged infringements against their constitutional right as citizens and taxpayers to be free of "establishment of religion." Americans United fears clerical establishment may be restored through tax exemption of the church in its many facets. The "church" today is increasingly involved in business, welfare, and political activities sheltered by various forms of tax exemption that give it a power not enjoyed by other persons and groups. This growing power is at the expense of religion, derogatory of religious liberty and unfair to interests not similarly exempt from "taxation."

STATUTE INVOLVED

Article XVI, Sec. 1, of the New York State Constitution and Sec. 420, Subdiv. 1, of the Real Property Tax Law of New York State which authorize tax exemptions for real property owned by religious organizations and used exclusively for religious purposes.

THE QUESTION PRESENTED

Whether Article XVI, Sec. 1, of the New York State Constitution and Sec. 420, Subdiv. 1, of the New York Real Property Tax Law, permitting tax exemptions for the real property owned by religious organizations and used exclusively for religious purposes, violate the religious clauses of the First and Fourteenth Amendments to the Constitution of the United States of America.

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[2] For further description of "POAU" see Leo Pfeffer, *Church, State, and Freedom* (1967 Beacon Press), p. 234.

STATEMENT OF THE CASE

Frederick Walz is a resident owner of real property in the County of Richmond in the City of New York. He seeks a court determination that Article XVI, Sec. 1 of the New York State Constitution and Sec. 420, Subdiv. 1, of the New York Real Property Tax Law unconstitutionally grant tax exemption to religious corporations on real property owned by them and used exclusively for religious purposes. The grounds for such complaint are that such exemption "constitutes an involuntary payment by plaintiff to the aforementioned religious organizations, in violation of plaintiff's right of religious freedom" and confiscates his property.

SUMMARY OF ARGUMENT

A state's power to tax or to exempt from tax church property used exclusively for religious purposes is not one that is subject to the limitations of the religious clauses of the First Amendment to the Federal Constitution. The power to tax or to exempt from tax is one of those residual powers of sovereignty that remained with the states unless clearly denied them by the United States Constitution.

If a state in its discretion chooses to exempt houses of worship from tax, this is a legitimate use of its taxing authority and does not constitute an act respecting establishment of religion. The "no-establishment" clause of the First Amendment, made applicable to the states by the Fourteenth, does not impose on the states a mandate to tax houses of worship. Nor does the "free exercise" clause of the First Amendment, made applicable to the states by the Fourteenth Amendment, make mandatory the exemption of houses of worship from tax. Residing with state and local authorities is the taxing power—*i. e.*, the power to exempt from tax or to tax. This power may not be removed or curtailed by Federal authority without a clear constitutional mandate. The courts offer avenues of protection for taxpayers against unjust, capricious or confiscatory abuse of the power to tax.

ARGUMENT

THE POWER TO TAX OR TO EXEMPT FROM TAXATION THE REAL PROPERTY OF CHURCHES, USED EXCLUSIVELY FOR RELIGIOUS PURPOSES, IS DISCRETIONARY WITH THE STATES AND IS NOT INHIBITED BY THE FIRST OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Relying on the religious clauses of the First Amendment to the United States Constitution, adopted in 1791, the appellant seeks protection from an alleged coerced support of churches through a subsidy in the form of a tax exemption on their real property used exclusively for religious purposes. The claim is that the "establishment" clause, which prohibits any aid to religion from the United States or the individual states, prohibits aid in the form of tax exemption. Such exemption in New York State rests on the provisions contained in Article XVI, Sec. 1, of the New York Constitution and Sec. 420, Subdiv. 1, of the New York Real Property Tax Law.

Article XVI, Section 1, of the Constitution of the State of New York–in as far as is here pertinent–provides:

> "Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for *religious*, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit." (emphasis added)

Section 420, Subdiv. 1, of the New York Real Property Tax Law provides:

> "Real property owned by a corporation or association organized exclusively for . . . religious . . . purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section."

It must be clear that, save for any prohibition in the United States Constitution which by its terms covers, or by judicial interpretation has been extended to cover, the individual state, New York State has the clear power to tax or exempt from taxation the real property of churches used exclusively for religious purposes. It is claimed, however, that the "establishment" clause of the First Amendment, which has long since been interpreted to apply its strictures to both the Federal Government and the state governments, (*Cantwell v. Connecticut*, 310 U.S. 296, 303) forbids any aid on the part of the United States or any state to any church.

It is settled constitutional principle that the state is free to select its objects of taxation, and pursuant to this power, may altogether decline to tax certain kinds of property, so long as there is a reasonable basis for the exemption. *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495 (1936); *Williams v. Baltimore*, 289 U.S. 36 (1933). Exemptions which the legislature, in its wisdom, grants to individuals or organizations, in order to encourage or foster the public good, long have been recognized as proper, and all that is required to sustain them is a showing of some fairly discernible relationship between the good of the person receiving the exemption and the good of the community. (*Williams v. Baltimore*, (p. 41)).

The State of New York has chosen in its fundamental law to exempt the real property of churches used exclusively for religious purposes. Is there anything in the "establishment" clause of the Federal Constitution which can be read to forbid this exemption? No. The highest court of the State of New York, in this very case, has upheld the validity of the statute granting tax exemption to real property owned by churches and used exclusively for religious purposes. The same result has been reached in numerous other state cases: See *La Fevre v. Mayor of Detroit*, 2 Mich. 586, 592 (1953); *Trinity Church v. City of Boston*, 118 Mass. 164, 165 (1875); *Trustees of Griswold College v. State*, 46 Iowa 275, 282 (1877); *Trustees of the First*

Methodist Episcopal Church, South v. The City of Atlanta, 76 Ga. 181, 192, 196-197 (1886); *Snyder v. Town of Newton, Conn.*, 161 A.2d 770, 776 (Conn., 1960), appeal dismissed, 365 U.S. 299 (1961); *General Finance Corp. v. Archetto*, 176 A.2d 73, 76-79 (R.I., 1961), appeal dismissed, 369 U.S. 423 (1961); *State ex rel Reynolds v. Nusbaum*, 115 N.W. 2d 761, 766 (Wisc., 1962). See also the following cases, which, without any particular discussion of the constitutional question, describe the salutary role such exemptions play in our society: *Nichols v. School Directors*, 93 Ill. 61, 64 (1879); *Y.M.C.A. of Omaha v. Douglas County*, 83 N.W. 924, 926 (Neb., 1900); *Commonwealth v. Y.M.C.A.*, 76 S.W. 522, 523 (Ky., 1903); *Church of the Holy Faith v State Tax Commission*, 48 P.2d 777, 784 (N.M., 1935).

There seems to be no question but that the highest courts of New York and of other states uniformly have upheld the constitutionality of tax exemption accorded to houses of worship, parsonages and other religious real property, whenever such an exemption has been attacked under state constitutional provisions requiring uniformity of taxation and forbidding the maintenance of churches by the state. No valid ground has been advanced by Appellant for a departure now from this settled authority.

The constitutionality under the Federal Constitution of exemptions accorded to churches has also been upheld by every state court or lower Federal court that has considered the question. The state cases are: *City and County of San Francisco v. McGovern*, 152 P. 980, 989 (Cal. App., 1915); *Garrett Biblical Institute v. Elmhurst State Bank*, 163 N.E. 1, 4-5 (Ill., 1928); *State v. Alabama Educational Foundation*, 163 So. 527, 530 (Ala., 1935); *Lundberg v. County of Alameda*, 298 P.2d 1 (Cal., 1956), dismissed, 352 U.S. 921 (1956); *Fellowship of Humanity v. County of Alameda*, 315 P.2d 394, 406-409 (Cal. App., 1957); *General Finance Corp. v. Archetto*, 176 A.2d 73, 76-79 (R.I., 1961), dismissed, 369 U.S. 423 (1961); *Sisters of Holy Cross v. Town of Brookline*, 198 N.E. 2d 624 (Mass., 1964).

The lower Federal court cases are: *County of Santa Clara v. Southern Pacific R.R. Co.*, 18 F. 385, 400 (9th Cir., per Associate Justice Field, 1882), affirmed, 118 U.S. 394 (1886); *Sovereign Camp W.O.W. v. Casados*, 21 F.Supp. 989 (D.C. N.M., 1938), affirmed, 305 U.S. 558 (1938); *United States v. Department of Revenue of State of Ill.*, 202 F.Supp. 757 (D.C. N.D., Ill., 1961), affirmed, 371 U.S. 21 (1962); *Swallow v. United States*, 325 F.2d 97 (10th Cir., 1963), cert. denied, 371 U.S. 950 (1963), rehearing denied, 372 U.S. 925 (1963).

The legal reasoning upon which the courts have unanimously found constitutional approval for religious tax exemptions is that such exemptions, because they do not involve the state in actively promoting or advocating religion or religious worship, are not within the category of governmental establishment of religion. Justice Reed in his dissenting opinion in *McCollum v. Board of Education*, 333 U.S. 203, (1948) lists tax exemption as one of the "incidental advantages that religious bodies, with other groups similarly situated, obtain as a by-product of organized society." He points out: "This explains the well-known fact that all churches receive 'aid' from government in the form of freedom from taxation." (p. 249)

Tax exemption is often regarded by the courts as one of the permissible "accommodations" to religion and it has always been recognized that the government may, in pursuit of its policy of neutrality, grant exemption to religious institutions in the same manner that it does to other charitable organizations.

There appears to be no Supreme Court opinion, directly on point, but a review of the cases where the subject of tax exemption for churches has been mentioned, and the cases which it has affirmed without opinion, leaves no room for doubt that the Supreme Court always has and still does consider religious tax exemptions to be constitutional.

An early Supreme Court case considering a tax exemption accorded religious institutions was *Gibbons v. District of Columbia*, 116 U.S. 404 (1886). There the question pre-

sented was whether grounds adjacent to St. Patrick's Church in the District of Columbia were exempt under a District of Columbia law exempting church buildings and grounds actually occupied by such buildings. The lower court denied the exemption on the grounds that the land neither was used for a church building nor reasonably needed for the enjoyment of the building as a church. The Supreme Court upheld the lower court's decision without questioning the soundness of the grant of tax exemption to the church on its exclusively religious properties. Likening the District of Columbia to a state, the court concludes its opinion by stating: "In the exercise of this power [the power to tax], Congress like any state legislature unrestricted by constitutional provisions, may, at its discretion, wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property." Since an exemption from taxation on real property used exclusively for religious purposes was involved, it is clear that this court had no reservations but that such an exemption was constitutional.

Further this Court has continually accepted as completely valid all nondiscriminatory exemptions from taxation granted to religious institutions under state and Federal tax statutes. That this Court may still hold to this view is shown by the fact that it recently dismissed, for want of a substantial Federal question, the only appeals to it from state court decisions upholding state religious tax exemptions, *Lundberg v. County of Alameda,* 298 P.2d 1 (Cal., 1956), dismissed, 352 U.S. 921 (1956); *General Finance Corp. v. Archetto,* 176 A.2d 73 (R.I. 1961), dismissed, 369 U.S. 123 (1961), and denied certiorari in the only case directly challenging the Federal income tax exemption to religious institutions, *Swallow v. United States,* 325 F.2d 97 (10th Cir., 1963), cert. denied, 371 U.S. 950 (1963), rehearing denied, 372 U.S. 925 (1963). Further evidence of this Court's present attitude may be found in *Abington School District v. Schempp,* 374 U.S. 203 (1963), the case in which the court declared unconstitutional the prescribed reading of the Bible at opening exercises in the public schools. Justice Brennan's con-

curring opinion specifically recognized the validity of tax exemptions to religious groups, and though the majority of the court did not join this opinion, undoubtedly because the precise question was not before them, a reading of the majority opinion and the concurring opinion of Justices Goldberg and Harlan leaves little doubt that the court agreed that separation of church and state does not require the abolishing of such tax exemptions.

This Court denied certiorari in a case involving the question of the constitutional basis of tax exemption under the Federal and Maryland Constitutions in *Murray v. Comptroller of the Treasury*, 241 Md. 383, 216 A.2d 897 (1966), cert. den., 385 U.S. 816 (1966). There the Court of Appeals of Maryland held that tax exemption for church properties under the state and Federal constitutions was proper. The Court extended the principle to the properties used for the secular activities as well as religious activities. Justice Reed in his dissenting opinion in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), indicated that it was his opinion not only that tax exemption for religious activities was not prohibited by the Federal Constitution but that:

> "Religious societies depend for their exemptions from taxation upon state constitutions or general statutes, not upon the Federal Constitution, *Gibbons v. District of Columbia*, 116 U.S. 404, 6 S.Ct. 427, 29 L.Ed. 680. (p. 128) . . . Whatever exemptions exist from taxation arise from the prevailing law of the various states. (p. 129) . . . It has never been thought before that freedom from taxation was a perquisite attaching to the privileges of the First Amendment. The national Government grants exemptions to ministers and churches because it wishes to do so, not because the constitution compels." (p. 130)

If one reads the religious clauses of the First Amendment which are cited to establish the principle of separation of church and state, it must be seen that the words:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

do not mention churches.

The real property owned by "churches" was probably minimal within the boundaries of the thirteen states at the time of the adoption of the First Amendment. From this, it can be concluded that the religious clauses of the First Amendment do not cover the problem of the taxation of real property owned by churches and used exclusively for religious purposes. These can then be imposed or exempted under the powers found in the state constitutions–including New York State. Or, as Mr. Justice Brennan observed in his concurring opinion in *Abington School District v. Schempp*, 374 U.S. 203 (1963):

> "Nothing we hold today questions the propriety of certain tax deductions or exemptions which incidentally benefit churches and religious institutions, along with many secular charities and nonprofit organizations. If religious institutions benefit, it is in spite of rather than because of their religious character. . . ." (p. 301-02)

In general, it is clear that the Federal Constitution provides that "Congress shall have the power to lay and collect taxes . . ." (Art. I, Sec. 8, cl. 1–U.S. Constitution) This Court has held that "In the exercise of its constitutional power to lay taxes, Congress may select the subjects of taxation, choosing some and omitting others." (*Sonzinsky v. United States*, 300 U.S. 506 (1937)). If this is true of the United States, it is true of the States, which have a broader base of power than does the United States. Further, this Court in *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937) pointed out:

> "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule

of equality of taxation . . . . This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation." (p. 509)

"A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution." (p. 510)

It is clear from these generalizations that Congress or the state legislatures, here New York State, have broad powers to tax and equally broad powers to exempt from taxation—there being no clear constitutional inhibition involved. It is important to note that the First Amendment does *not* read: "Congress shall make no law respecting an establishment of a church, . . ." The word "church" is not used once in the entire Constitution or any of its amendments. In addition, no mention is made of taxation or exemption from taxation in the First Amendment. From this fact it could be argued that the founding fathers in drafting the "free exercise" clause were more interested in protecting "religion" than protecting or fostering any of the existing churches. This interpretation finds support in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) which is widely cited as authority for the proposition that government can tax the preacher and the church, but not the right to religious exercise—to tax "churches" in the sense of real property, but not "religion" in the sense of its function.

There are those who will argue that the power to tax the church sanctuary may be exercised to destroy "churches" and hamper religion as the pendulum of permissiveness gains momentum. They fear the legislatures will drive religion and the churches underground. The Christian religion gained its first strength literally, "underground." Perhaps it needs to return to its catacombs to renew its witness. Be that as it may, Justice Frankfurter supplied one answer:

"The power to tax like all powers of government, legislative, executive and judicial alike can be abused

> or perverted. The power to tax is the power to destroy only in the sense that those who have the power can misuse it."

Mr. Justice Holmes disposed of this smooth phrase as a constitutional basis for invalidating taxes when he wrote:

> "The power to tax is not the power to destroy while this Court sits." (*Panhandle Oil Co. v. State of Mississippi ex rel. Knox*, 277 U.S. 218, 223, 48 S.Ct. 451, 453, 72 L.Ed, 857, 56 A.L.R. 583." (p. 137))

There appears to be no useful purpose here to note the many supplementary authorities available for a study in depth of the social, religious and political aspects of the problem of the taxation of churches. A book, *Should Churches Be Taxed?* by D. B. Robertson, published in 1968, gives a comprehensive review of the whole field. Even later we find published a serious study of "the amount of tax-exempt property in this country, what proportions of it are public and private, and, of the latter, what ratios are secular and ecclesiastical, and, finally, how the latter is apportioned among the principal religious divisions." (p. ix– *The Churches: Their Riches, Revenues, and Immunities* by Martin A. Larson and C. Stanley Lowell). And finally, for general background, there is nothing more enlightening than Dr. Leo Pfeffer's *Church, State, and Freedom* (1967).

Returning to the "law" of the case, we respectfully bring to the court's attention the language which it used in *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U.S. 232 (1890), where this Court stated without any equivocation:

> "The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, *if it chooses, exempt* certain classes of property from any taxation at all, such as *churches* *** All such regulations, and those of like character, so

long as they proceed within reasonable limits and general usage, are *within the discretion of state legislatures*, or the people of the State in framing their Constitution." (p. 237) (emphasis added).

CONCLUSION

For the reason stated above, the judgment of the Court of Appeals for the State of New York should be affirmed.

Respectfully submitted,

Protestants and Other Americans United for Separation of Church and State, *amicus curiae*

Franklin C. Salisbury
Attorney for Amicus
1518 K Street, N. W.
Washington, D. C. 20005
Tel. No. (202) 783-3617